Supreme Court, U.S.
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87-301

No.

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1986

OPAL V. MITCHELL, AND WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioners,

v.

UNITED STATES OF AMERICA, AND BONNEVILLE POWER ADMINISTRATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STAT

QUESTIONS PRESENTED

1. When an agency of the United States otherwise would be subject to a common law duty to warn of hazards it created on lands occupied by it, does the discretionary function exception of the Federal Tort Claims Act (FTCA) negate that duty, on the basis that the agency has decided to comply with less stringent, merely *minimum* regulatory standards, established by a separate federal agency?

2. Is a proper test of "discretionary function" under the FTCA to determine whether a governmental act or decision was made at the "operational" or the "planning" level?

PARTIES TO THE PROCEEDING

Petitioner Opal V. Mitchell is the widow of Vernon Mitchell, who died when his single engine airplane struck an unmarked "ground wire" stretched between the tops of two power transmission towers erected by the Bonneville Power Administration, intersecting a busy aerial flight path along a canyon located in eastern Washington State.

Petitioner Washington State Department of Labor and Industries administers the State's industrial insurance laws. Following her husband's death, Opal V. Mitchell applied for, and received, a widow's pension because of her husband's death while in the course of his employment. She subsequently assigned her interest in her cause of action against the Bonneville Power Administration to the Washington State Department of Labor and Industries. This petition is filed in the name of Mrs. Mitchell pursuant to Wash. Rev. Code § 51.24.050.

Respondent Bonneville Power Administration is a federal agency authorized to distribute electrical power in several states, including Washington State.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION

Petitioners Opal V. Mitchell and the Washington State Department of Labor and Industries respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above entitled proceeding on April 15, 1986.

OPINIONS BELOW

The opinion for the Court of Appeals for the Ninth Circuit is reported at 787 F.2d 466 and is reprinted in the appendix hereto, page A1 *infra*.

The Findings of Fact, Conclusions of Law and Order of the United States District Court for the Eastern District

of Washington (Justin L. Quackenbush, District Judge) are not reported. The court adopted its oral findings of fact, which are reprinted in the appendix hereto, page B1 *infra*.

JURISDICTION

Petitioners filed a claim for damages with the Bonneville Power Administration based on Mr. Mitchell's death. When the claim was denied, petitioners timely filed an action under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) ("FTCA"). After a trial on the merits, the District Court entered judgment on February 1, 1985, finding the Bonneville Power Administration to have been at fault for failure to mark aerial obstructions, and awarded damages. Respondent filed a notice of appeal on March 29, 1985 to the United States Court of Appeals for the Ninth Circuit. On April 15, 1986, the Court of Appeals reversed the judgment below, concluding that the Bonneville Power Administration has "discretionary immunity", and remanded to the District Court with instructions to dismiss for lack of subject matter jurisdiction. On April 29, 1986 petitioners filed a petition for rehearing en banc with the Court of Appeals. On April 24, 1987 the Court of Appeals denied the petition for rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1346. United States as Defendant

(b) * * * [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of place where the act or omission occurred.

28 U.S.C. § 2674. Liability of United States

The United States shall be liable respecting the provi-

sions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * * *

28 U.S.C. § 2680(a). Exceptions

The provisions of * * * section 1346(b) of this title shall not apply to—

(a) any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

Introduction

The District Court concluded on the basis of the facts presented at trial that the Bonneville Power Administration (BPA), a federal agency, had a duty to warn of hazards to aerial navigation created by its construction of power lines spanning a canyon. Having failed to meet that duty, damages were awarded. The following facts are the established facts of the case and were accepted by the Circuit Court.

Factual Background

On the morning of May 18, 1980, at about 8:30 a.m., Vernon C. Mitchell, the owner and operator of a small business in Ellensburg, Washington providing aerial spray services for agricultural purposes, flew a single engine airplane to a place along the Yakima River between Cle Elum and Ellensburg known as Bristol Flats. Mr. Mitchell was a careful and experienced pilot with over 18,000 hours of flying time. He was a former Air Force pilot, an instructor in aerial safety classes, a flight instructor, an FAA examiner, and had a flawless safety record.

Mr. Mitchell flew above the Yakima River, following a canyon which is one of the most heavily travelled visual flight routes in eastern Washington. Pilots frequently fly low in this area due to weather conditions, or simply to sightsee. This canyon is intersected at Bristol Flats by a large complex of power lines which cross the state from the Columbia River to the Seattle area. The power lines were

designed, constructed, and maintained by the defendant, BPA. There are four tall steel towers on the west side of the canyon, which are paired with five similar towers on the east side, holding a total of thirty-three large conductor wires which droop down into the canyon. The two sets of towers are more than 2,100 feet apart. The conductor wires are approximately 1.6 inches in diameter, are grouped by spacer bars into clusters of three, and are clearly visible to approaching aircraft.

Unknown to Mr. Mitchell, one pair of towers also had two 3/8 inch steel cables stretched between their tops, nearly 400 feet above the canyon floor. These ground wires were not marked with visual warning devices. The purpose of these ground wires was to conduct lightning strikes to the ground without damaging the electrical conductors below. These wires were slightly oxidized and virtually impossible to see. Mr. Mitchell's plane struck one of these ground wires and immediately plunged to the ground, killing Mr. Mitchell.

The crash was seen by four eyewitnesses. A farmer, Mr. Wallace, stepped out into his yard after hearing the plane approach. Three recreational rafters on the Yakima River also witnessed the accident. These witnesses saw the plane inexplicably lurch to a stop in midair and plunge to earth. None of the witnesses initially realized that the plane had in fact hit one of the ground wires. This was for the simple reason that none of them could see the wires. Indeed, Mr. Wallace testified that although he had looked into the electrical wires hundreds of times while he worked his field, he had never seen the ground wires until after Mr. Mitchell's death.

The trial judge, who had viewed the ground wires from a helicopter, characterized them as follows:

> I find, in fact, that this was a trap for a pilot. A pilot flying from the north to the south in this area would clearly see these large transmission lines in the bundles, and then 135 or 140 feet above those lines is the snare, to wit, a very small in diameter wire of a color that blends in with the environment and blends in with these large transmission lines.

The BPA had established a policy of following the guidelines of the Federal Aviation Administration (FAA)

on aerial markings, as a minimum standard for obstruction marking on new construction. Those guidelines required marking above 500 feet. However, the BPA also occasionally marked lines where they might otherwise create a public hazard, even though not required by the FAA guidelines. For example, the BPA placed marker balls where its lines created a hazard to small aircraft on Lake Roosevelt, at the north end of the Columbia River, although not required by FAA standards. In the vicinity of the Boardman Bombing Range in northwestern Oregon, the BPA again voluntarily exceeded the minimum standards for aerial markers established by the FAA. Finally, the BPA placed aerial markers wherever its power lines intersected with other power lines, in order to protect BPA helicopter crews.

Washington State regulations on aerial obstructions require markings for wires or lines between 150 and 500 feet above the ground (500 feet being the FAA minimum standard) where they cross certain visual flight routes frequented by small aircraft. Wash. Admin. Code § § 12-24-010 *et seq.* For example, wherever such power lines cross a canyon (as in this case), a river, a lake, or a mountain pass, visual markers must be used. Wash. Admin. Code § 12-24-005(2). It is undisputed that the Washington State Aeronautics Division would have required marking of the ground wires at Bristol Flats if the State had been properly notified of them by the BPA. Wash. Admin. Code § 12-24-350(4).

Procedural Background

Opal V. Mitchell, the widow of Vernon Mitchell, filed a claim for widow's benefits with the Washington State Department of Labor and Industries. Mrs. Mitchell's claim was approved. Her benefits continue to be paid to this date. Mrs. Mitchell elected not to pursue her claim against the BPA, but assigned her rights to the State under Wash. Rev. Code § 51.24.050(1). If recovery is made against the BPA, the State will be reimbursed for pension benefits already paid, and most of the balance of the proceeds from such recovery will be paid over to Mrs. Mitchell. Wash. Rev. Code § 51.24.050(4).

After its approval of Mrs. Mitchell's claim, the State filed an action for damages against the BPA in the United States District Court for the Eastern District of Washington. Two theories of liability were advanced by the State—(1) negligence in stringing and not marking an invisible cable across a busy aerial highway; and (2) violation of a landholder's duty to warn licensees travelling over its land of dangerous hazards erected by the landholder but invisible to the licensee. The matter was tried to the court under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b).

The District Court found that the BPA was negligent for failing to install marker balls to warn of the existence of the ground wires and entered judgment for Mr. Mitchell's estate and widow for slightly more than $300,000.

The District Court also specifically found that BPA's "so-called policy" with respect to the marking of wires did not fall within the discretionary function exception. *See* p. B 9-10 *infra*.

The Court of Appeals for the Ninth Circuit reversed and remanded to the District Court with instructions to dismiss for lack of subject matter jurisdiction, holding that the BPA's failure to place marker balls on the ground wires was the exercise of a "discretionary function" as that term is used in the FTCA, 28 U.S.C. §2680(a). A petition for rehearing en banc was denied by the Ninth Circuit Court of Appeals on April 24, 1987.

REASONS FOR GRANTING THE WRIT

I. The Circuits Are In Conflict Concerning The Impact Of Compliance With Federally Established Minimum Standards On The Application Of The Discretionary Function Exception To The FTCA.

The District Court in this case recognized that the BPA owed a duty under state regulation of aerial obstructions and under the common law of torts, to warn licensees, such as Mr. Mitchell, of the hazardous condition which it had erected on its lands. The District Court rejected the notion that the discretionary function exception to the FTCA, § 2680(a), somehow converted this nondiscretionary duty to warn into a matter of immunized gov-

ernmental policy, simply because the BPA chose to ignore its duty in favor of observing less stringent, admittedly *minimum* standards, established by the FAA.

The Ninth Circuit reversed, in a decision that fundamentally and erroneously broadens the scope of the discretionary function exception to the FTCA. According to the Ninth Circuit, § 2680(a) protects a federal agency's failure to comply with an otherwise applicable mandatory duty of care, if the agency has opted to ignore that duty, in favor of observing only less demandng, admittedly *minimum* requirements established by a separate federal agency.[1] In other words, according to the Ninth Circuit, a decision by a federal agency to opt out of otherwise applicable mandatory duties, in favor of admittedly minimum standards of another federal agency, is a protected exercise of governmental discretion under the FTCA. In its practical effect, the Ninth Circuit's ruling means that for purposes of the FTCA, federally established minimum standards will become the maximum duty to which an agency of the United States may be held.[2]

This interpretation of a § 2680(a) by the Ninth Circuit is in direct conflict with the Eighth Circuit's recent interpretation of that provision in *Aslakson v. U.S.*, 790 F.2d 688 (8th Cir. 1986).

In *Aslakson*, the operator of a sailboat was killed when the aluminum mast on his craft struck electrical power lines owned and operated by the Western Area Power Administration (WAPA). WAPA was required to maintain its power lines in conformity with the vertical clearance requirements of the National Electric Safety Code (NESC) in effect at the time the lines were installed—1948, in the *Aslakson* case. WAPA also had a policy under which it raised its power lines to comply with later revisions of the NESC, if the power lines constituted a safety hazard. The lines involved in the *Aslakson* case complied only with 1948 NESC requirements.

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[1]And this is so under the Ninth Circuit's decision, in spite of the fact that the federal agency has often taken precautionary measures beyond those required by the minimum standards.

[2]Such a rule, of course, turns basic principles of tort law topsy-turvy. *See*, for example, Section 288(c) of the Restatement of Torts (2d) which recognizes that compliance with a legislative enactment or administrative regulation does not preclude a finding of negligence.

In *Aslakson*, the U.S. argued that WAPA's decision not to elevate the lines beyond the clearance provided for by 1948 NESC standards was immunized from liability by the discretionary function exception to the FTCA. The Eighth Circuit rejected that argument. It did so on the basis that WAPA was subject to an established standard—a duty to elevate its power lines, if they posed a safety hazard. The Eighth Circuit held that § 2680(a) did not immunize WAPA's decision to pursue a course of action it deemed desirable, where that course conflicted with an established safety policy. In other words, § 2680(a) did not immunize WAPA's decision to ignore a nondiscretionary duty in favor of complying with less stringent minimum standards established by the NESC.

The interpretation of § 2680(a) by the court in *Aslakson* directly conflicts with the Ninth Circuit's interpretation of that provision in the instant case. Here, the BPA decided to forego compliance with mandatory safety duties imposed upon it by the common law and state regulations, choosing instead to observe only *minimum* standards established by the FAA. In *Aslakson*, WAPA chose to ignore a mandatory safety duty imposed by its own policy, in favor of observing less demanding *minimum* standards of the NESC. The Eighth Circuit held that § 2680(a) does not encompass an agency's decision to ignore a mandatory duty in order to comply with less stringent minimum standards established by another agency. The Ninth Circuit has held in the instant case that § 2680(a) indeed shields just such a decision.

The Ninth Circuit's interpretation of the discretionary function exception also runs contrary to the very purpose of the FTCA. If allowed to stand, it will wholly undermine the protection that the FTCA was intended to offer tort victims. For under the Ninth Circuit's interpretation of § 2680(a), each federal agency may decide for itself whether and to what extent it will be liable in tort. In this respect, we believe that language of the Tenth Circuit in *Smith v. U.S.*, 546 F.2d 872 (10th Cir. 1976) expresses well the critical point. There, as here, the U.S. attempted to paint a decision to forego compliance with a common law landholder's duty to warn of hazards as a protected governmental policy decision. The Tenth Circuit rejected the government's effort stating:

If we were to accept the Government's broad interpre-

> tation of the discretionary exception, it is difficult to perceive which duties under tort law could not be avoided by a similar policy decision to ignore them.

Smith, supra, 546 F.2d 877.

This Court recognized in *U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) that Congress did not intend that the discretionary function exception insulate federal agencies from liability for common law torts.

> * * * [T]he common law torts of employees of regulatory agencies, as well as of all other Federal agencies, would be included within the scope of the bill.

Varig Airlines, supra, 467 U.S. at 810, quoting from hearings before the House Committee on the Judiciary, 77th Congress, 2nd Session, 28, 33 (1942).

The principle applied by the Ninth Circuit in the instant case frees any federal agency from liability for its common law torts, to the extent that the agency chooses to acknowledge and adopt a lesser duty.

II. The Circuits Are In Conflict Concerning The Continued Viability Of The Distinction Between Operational And Planning Decisions As A Test For Applying The Discretionary Function Exception.

In response to the distinction in *Dalehite v. U.S.*, 346 U.S. 15 (1953), between decisions at the operational level, as contrasted to the planning level, the Ninth Circuit stated, "this court has abandoned such a distinction in light of *Varig Airlines'* focus on the nature of the conduct involved." This abandonment is at odds with the rule applied by the Third, Eighth, Tenth, and Eleventh Circuits.

A. The Eighth Circuit

We have previously discussed the Eighth circuit's decision in *Aslakson*. We additionally note here that the *Aslakson* court rejected the government's argument that any decision by WAPA officials regarding the safety of its power lines would be protected by the discretionary function exception. In so doing, the Court of Appeals relied upon the distinction between decisions made at the opera-

tional level and those made at the planning level. The Court stated:

> * * * As a general rule, *operational mismanagement* in the maintenance of electrical transmission lines does not fall within the scope of the discretionary function exception * * * *

B. **The Eleventh Circuit**

In *United States Fire Insurance Co. et al. v. United States*, 806 F.2d 1529 (11th Cir. 1986), the court held that the discretionary function exception did not protect the United States from liability for the Coast Guard's negligence in placing and maintaining navigation markers. The court acknowledged the general rule that the discretionary function exception shields the government from liability for negligent acts of its employees carrying out operations of government in accordance with official direction, citing *Dalehite v. United States*, 346 U.S. 15 (1953). However, the court went on to say that § 2680(a) shields the government from liability only where the negligent acts are "dictated by guidelines adopted at the policy-making level." *U.S. Fire Insurance Co., supra* at 1536. Similarly, in *Drake Towing Co., Inc. v. Meisner Marine Construction Co.*, 765 F.2d 1060 (11th Cir. 1985), the Eleventh Circuit held that the United States could be sued for negligent placement of temporary buoys by the Coast Guard. The Court distinguished both *Dalehite* and *Varig Airlines*, noting that the Coast Guard in *Drake Towing*, had made a policy decision to place buoys in certain locations. However, having made that discretionary decision, negligence in actual placement of the buoys would not be protected by the discretionary function exception. "Once such aides are established, * * * negligence in their maintenance and operation implicates operational functions and is actionable." *Drake Towing Company, supra* at 1064. *Accord, Alabama Electric Cooperative, Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985).

C. **The Tenth Circuit**

The operational versus planning level distinction has also recently been applied in the Tenth Circuit. *See, e.g., Weiss v. United States*, 787 F.2d 518 (10th Cir. 1986) at

523, quoting *Jackson v. Kelly*, 557 F.2d 735 (10th Cir. 1977) (en banc):

> Generally speaking, a duty is discretionary if it involves judgment, planning, or policy decisions. It is not discretionary if it involves enforcement or administration of a mandatory duty at the operational level, even if professional expert evaluation is required.

D. **The Third Circuit**

Finally, the operational/planning test is also applied by the Third Circuit. For example, in *Pooler v. United States*, 787 F.2d 868 (3rd Cir. 1986) the Third Circuit affirmed a district court decision dismissing the actions of two persons who claimed they were falsely arrested as the result of an investigation of charges of marijuana sales on the premises of a Veterans Administration Hospital. In reaching its decision, the court expressly applied the operational/planning distinction. *Pooler*, *supra* at 870.

CONCLUSION

The Ninth Circuit has gone too far in its interpretation of the discretionary function exception to the FTCA. That exception is not intended to allow federal agencies, such as the BPA, to flout common law duties in favor of compliance with less stringent, *minimum* standards established by another federal agency. In the instant case, the BPA decision to place unmarked ground wires across heavily travelled airspace was a decision actionable at common law. Congress did not exempt such decisions from liability under the Federal Tort Claims Act.

The Ninth Circuit has also gone too far in its complete rejection of the operational versus planning level test for discretionary decisions under the FTCA. We believe the Ninth Circuit erroneously has jettisoned a valuable benchmark in interpreting § 2680(a) and has thereby lost sight of the primary purpose of the discretionary function exception—*i.e.*, to insulate *governmental policy decisions* from liability in tort.

Petitioners Opal V. Mitchell and the State of Washington respectfully submit that the Supreme Court should grant their petition for certiorari to the Ninth Circuit Court of Appeals. Its decision in the instant case is con-

trary to principles previously established by this Court in construing the discretionary function exception to the Federal Tort Claims Act. Moreover, its decision is clearly in conflict with decisions of the Third, Eighth, Tenth, and Eleventh Circuits.

This conflict can and should be resolved by granting our petition for certiorari in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 85-3744
DC NO. C 82-880-JLQ

OPAL V. MITCHELL,

Plaintiff-Appellee,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted February 13, 1986
Seattle, Washington

Before: WALLACE and SKOPIL, Circuit Judges, and HENDERSON,* District Judge

SKOPIL, Circuit Judge:

The government appeals from a district court finding of liability for the death of Vernon Mitchell. We reverse.

FACTS AND PROCEEDINGS BELOW

Vernon Mitchell contracted to crop dust a field located near the Yakima River in Washington. On May 18, 1980 his plane struck unmarked power transmission ground wires, resulting in his death. His wife, Opal Mitchell, brought a wrongful death action against Bonneville Power Administration ("BPA"), pursuant to the Federal Torts Claims Act, 28 U.S.C. § 2674 ("FTCA"). She alleged the BPA negligently failed to alert pilots of the presence of ground wires by failing to install warning devices. The government moved for summary judgment, claiming its decision not to mark ground wires with warning devices constituted a "discretionary function" within the protec-

*The Honorable Thelton E. Henderson, United States District Judge for the Northern District of California, sitting by designation.

tion of 28 U.S.C. § 2680(a). Alternately, the government claimed its decision was reasonable.

The district court denied the government's motion. After trial, the court concluded the agency was negligent in failing to mark the ground wires, and in "blindly relying upon the advice of the Federal Aviation Administration as to whether or not the lines should be marked without making any independent investigation." The court also found Mr. Mitchell was twenty-five percent contributorily negligent.

The government appeals.

DISCUSSION

A party may bring a cause of action against the United States only to the extent the government has waived its sovereign immunity. *United States v. Orleans*, 425 U.S. 807, 814 (1976). A party bringing a cause of action against the federal government bears the burden of demonstrating an unequivocal waiver of immunity. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984).

28 U.S.C. § 2680(a) sets forth the so-called discretionary function exception to the government's waiver of immunity under the FTCA. This section precludes the exercise of jurisdiction over any claims "based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). *See Dalehite v. United States*, 346 U.S. 15, 33 (1953).

This court reviews *de novo* a district court's determination of subject matter jurisdiction under the discretionary function exception. *Chamberlin v. Isen*, 779 F.2d 522, 523 (9th Cir. 1985). The court must look to the nature of the allegedly negligent conduct to determine whether the discretionary function exception governs in a particular case. "[T]he basic inquiry * * * is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense ("Varig Air-*

lines", 467 U.S. 797, 104 S. Ct. 2755, 2764-65 (1984). The purpose of the exception is to prevent judicial second-guessing of legislative and administrative policy. *Id.* at 2765. If judicial review would interfere with this kind of agency decisionmaking, the exception applies and thereby denies this court jurisdiction. *Chamberlin*, 779 F.2d at 523.

In this case the district court found the agency's decision to rely on FAA recommendations to not mark ground wires was not protected by the discretionary function exception. The court reasoned the agency decision was made at the operational level rather than the planning level. *See Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1975). This court has abandoned such a distinction in light of *Varig Airlines'* focus on the nature of the conduct involved. *Begay v. United States*, 768 F.2d 1059, 1062 n.2 (9th Cir. 1985). In *Begay*, we concluded that the decision not to warn of potential safety hazards "was clearly the type of decision of an agency which Congress sought to protect from judicial review under the Tort Claims Act." *Id.* at 1066.

The BPA's decision not to install warning devices is protected by section 2680(a). The BPA did not negligently install or maintain warning devices, but rather, affirmatively decided to adopt the FAA's policy of not marking ground wires below 500 feet. The Federal Aviation Administration Act, 49 U.S.C. § 1421 authorized the FAA to regulate air safety. The BPA does not have similar statutory authorization and therefore chose to rely on FAA standards regarding whether to mark ground wires. Its choice to leave air space safety standards to be set chiefly by the FAA was "grounded in social, economic, and political policy." *Varig Airlines*, 104 S. Ct. at 2765. Our review of this decision would encroach upon the agency's decisionmaking process; the exception therefore applies and we are without jurisdiction to review the agency's decision. *See Begay*, 768 F.2d at 1064.

Mitchell argues that "BPA was without discretionary authority to breach the duty of care imposed by Washington law." Negligence, however, is irrelevant to the discretionary function issue. The FTCA itself exempts discretionary functions "whether or not the discretion in-

volved be abused." 28 U.S.C. § 2680(a). *See also Cisco v. United States*, 768 F.2d 788, 789 (7th Cir. 1985).

Mitchell also argues this case is distinguishable from *Varig Airlines* and *Begay* because in those cases the agencies did not act in "the primary role." That is, the agencies were regulating industries which were more directly responsible for the dangerous condition and resulting injury. This court, however, has stated that section 2680(a) is not relegated to strictly regulatory actions. *Begay*, 768 F.2d at 1064; *see also Varig Airlines*, 104 S. Ct. at 2763; *Dalehite*, 346 U.S. at 39-42.

The judgment below is REVERSED and this case is REMANDED to the district court with instructions to dismiss for lack of subject matter jurisdiction.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-82-880-JLQ
December 13, 1984
Spokane, Washington

OPAL V. MITCHELL, personal representative
in the matter of the Estate of
VERNON C. MITCHELL, deceased,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORAL OPINION AS AMENDED

THE HONORABLE JUSTIN L. QUACKENBUSH, Judge
December 13, 1984
12:30 o'clock, PM

THE COURT: I make the following findings of fact:

I find that on the morning of May 18, 1980, the day of Mount St. Helens eruption, at about 8:30 AM, Mr. Vernon Mitchell left a small airport to the south of Ellensburg in a Gruman Ag-Cat carrying what would appear to be almost a full load of agricultural spray product.

I find that sometime prior to that, a few days, some three to ten days prior to May 18, 1980, that his son, Ron Mitchell, had overflown the Wallace field which was to be sprayed.

I further find that on that trip by the son, Ron Mitchell, either he did not observe the ground wires or he failed to specifically advise his father of the ground wires. That, of course, does not limit the responsibility which Mr. Vernon Mitchell had in seeing what was there to be seen, as pointed out by Mr. Jones. The goats peaks were there to be seen; whether the ground wires could be seen is a matter that I will subsequently cover.

I find that Mr. Vernon Mitchell flew from the area of Ellensburg where he intersected the southeast end of the

Wallace field. I find that Mr. Mitchell then flew the length of the Wallace field and that he generally followed the Yakima River as he travelled in the northwesterly direction.

I find that at the time of the accident Mr. Mitchell was a most experienced pilot having in excess of 18,000 hours of flying time, thousands of hours of experience in agricultural spraying aircraft. I find that he was a careful pilot. There is no evidence to indicate that Mr. Mitchell was anything but a most careful pilot. In fact, he had instructed himself in aerial safety classes. He was a flight instructor, an FAA examiner, and I find Mr. Mitchell was, in fact, a careful and observant pilot with much experience around power lines.

I find that Mr. Vernon Mitchell knew that the power lines in question existed and where they existed, to-wit, at the north end of the Wallace field.

I find that the Bonneville Power lines in question cross a valley. There are four sets of towers across this valley with apparently five sets of lines totalling 33 conductors. This valley is an agricultural valley.

The power lines traverse the Yakima River; they traverse the old main highway between Seattle and Spokane, Highway 10; they traverse railroad tracks; they traverse an area that has been used for agricultural purposes for many years and an area where agricultural spraying has taken place for many years, including many years prior to the erection of the last power line in question in 1973 or 1974, being the Grand Coulee-Raver Line. Apparently these power lines cover an area of some 650 feet in width as they travel from east to west. Only the Grand Coulee-Raver Line has ground wires on top of the large transmission or conductor lines.

It would appear that the valley floor in the area of the power lines has an elevation of approximately 1,787 feet above sea level. Without regard to any sag in the ground wires, a straight line from the top of the goats tail on the tower supporting the Grand Coulee-Raver Line from east to west would average out at 2,193 feet. One would assume that if the line, the ground wire, ran straight that that would have been its elevation above sea level. The differ-

ence between that and the floor of the valley below the lines would be 406 feet. Taking into account the sag, and I recognize that it varies based upon temperature, wind conditions, and ice load, it would appear that the ground wires were some 380 feet above the floor of the valley; certainly over 350 feet.

The transmission lines, which are some 135 or 140 feet below these ground wires, are 1.6 inch cables in groups of three, those groupings having a diameter of some 18 to 24 inches. Those transmission lines, both from the testimony presented in court and from my own personal observation as a result of counsel taking me to the scene, are clearly visible. Those transmission lines, as they are grouped together, are easily visible both from the air and from the ground.

On the other hand, the ground wires, some 135 or 140 feet above the transmission lines, are extremely difficult to see. They are light colored, only three-eights of an inch in diameter; they blend with the environment and with the sky. As one flies from the north to the south, from the testimony, one would look for the ground wires, and the 33 conductor wires are to the south of the ground wires and the location. The presence of those conductors causes the ground wire, if it is seen or can be seen to blend in with the 33 transmission lines contained on the other three lines to the south. Once again, that finding is based upon looking for the ground wires from a plane to the north of the ground wires and the conductors. The goats peaks are easily seen; however, there are no goats peaks on the towers other than the Grand Coulee-Raver Line obviously because there are no ground wires on those lines.

On May 18th, I find that Mr. Vernon Mitchell flew to the scene, climbed from the elevation which he was at as he passed over the Wallace field on his northerly trip, and proceeded to the north of the power lines where he commenced a tight left-hand turn preparatory to making his first pass to spray the field from the north to the south. I find that it was his intent to spray only from the north to the south coming down over the power lines on his southerly run and spraying and then coming back up over the power lines without spraying for another pass.

I find that the location of this power line as it crosses this valley from the mountains on each side is, in fact, in the flyway. Pilots don't fly flyways as if you were driving down the center line of a highway. There is no requirement that the pilot stay within any specified corridor of the flyway. The flyway in this case is in the direct course from what is obviously the location of the OMNI, being the navigational device located in Ellensburg and that located on the west side of the mountains in the Seattle area.

I find that this is a heavily travelled valley by aircraft travelling between Yakima and Ellensburg, and even in some instances, the Spokane to Seattle route. I find it was heavily travelled by aircraft, including general aviation aircraft flying under general flight rules at the time that the towers were built by the Bonneville Power Administration.

I find that, going back to the day in question, Mr. Mitchell passed over the top of the ground wires in his northerly pass; that he then made his turn, and that for the reasons stated, he either did not see or because of the conditions that I have previously mentioned, lost sight of or was unable to pick up the ground wires as he proceeded south after completing his turn.

I find that there was no pilot error in his turn. I find that the airplane did not stall. I find that the wobbling of the wings as observed by the two teachers who testified who were on the river was, in fact, caused by the Ag-Cat aircraft striking the ground wires.

I find then that upon the aircraft striking the ground wires either through the loss of power as a result of hitting those ground wires, or the change of attitude of the aircraft, the aircraft was pulled down into the transmission lines and specifically the transmission line broke as a result of which then the plane descended nose first and crashed resulting in the death of Mr. Mitchell.

The ultimate question, of course, is whether or not there was negligence on the part of Bonneville Power Administration in failing to mark the line.

Because of the location of this valley and the location of the lines, I find that the government, Bonneville Power Administration, was negligent in its failure to install warning markers to warn pilots of the existence of the ground

wires some 300 to 400 feet above the valley floor and some 135 feet above the bundles of the large conductors which were clearly visible and would be clearly visible to pilots.

I have previously found that the ground wire is extremely difficult to see and can easily be lost sight of particularly in the circumstances such as this where Mr. Mitchell made a turn and proceeded in a southerly direction and would be looking at the ground wires and looking down toward the ground wires and those large conductors into which the ground wire would blend.

I further find that a pilot could easily be misled by the fact that only the Grand Coulee-Raver Line had goats peaks. In looking at these towers, the numerous towers, the only tower with goats peaks which would forewarn an experienced pilot such as Mr. Mitchell of the existence of a ground wire is the Grand Coulee-Raver Towers.

I find that the Bonneville Power Administration was further negligent in blindly relying upon the advice of the Federal Aviation Administration as to whether or not the line should be marked without making any independent investigation or inquiry itself or seeking comments specifically from pilots or pilot organizations as to these power lines which cross this heavily travelled area with the very hard to see ground wires 135 or 140 feet above the clearly seen transmission conductors.

It is clear the Federal Aviation Administration's action is advisory only and Bonneville Power Administration knew it was advisory only. Bonneville Power Administration's so-called policy at that time recognized that this was advisory only in that the policy was that at a minimum the Bonneville Power Administration would follow the recommendations of the Federal Aviation Administration as to marking. The fact that the Federal Aviation Administration did not make a recommendation as to marking did not abrogate the responsibility of Bonneville Power Administration to make its own analysis, an analysis that I find they did not make as to the hazard which I find was created by these ground wires.

I find, in fact, that this was a trap for a pilot. A pilot flying from the north to the south in this area would clearly see these large transmission lines in the bundles,

and then 135 or 140 feet above those lines is the snare, to-wit, a very small in diameter wire of a color that blends in with the environment and blends in with these large transmission lines.

I find that while the FAA minimum height of VFR flight is 500 feet above ground level, many pilots for various reasons either choose or are required to fly below 500 feet in this area due to weather. I accept Mr. Stitt's testimony in that regard that it is common for VFR pilots traversing an area such as this to fly below 500 feet due to weather. I find that pilots in this area would be flying below 500 feet for purposes such as inspecting other power lines, for possible emergency landings, or for agricultural spraying, which, as I have found, is common in this area.

Clearly, Mr. Mitchell was not in violation of any FAA regulation in being below 500 feet since the regulations allow lower altitudes in connection with agricultural spraying.

I find that Bonneville Power Administration had a duty to warn of this trap, to warn of this hazardous condition by marking the ground wires. This could have been easily done with minimal expense at the time of the construction of the line, at the time of the installation of the ground wires. Expense certainly should not have been a consideration by the Bonneville Power Administration in making the decision as to whether or not to install the marker balls when they erected that ground wire.

Once again, I find that the cost would have been minimal to install marker balls. As was pointed out by Mr. Gonzalez' testimony, the installation of the marker balls is hazardous work, but evidently is done on lines that have already been installed and balls could have been installed by Bonneville Power Administration through the use of four men for two days in the area in question even after the transmission line and ground wires had been erected.

I find that the failure of the Bonneville Power Administration to place warning markers on the ground wires constituted a failure on the part of Bonneville Power Administration to exercise reasonable care to avoid unreasonable risk or harm to low flying aircraft, and in that regard, Bonneville Power Administration was negligent.

I further find that it was completely foreseeable that a low flying pilot, particularly flying from the north to the south, would not see the ground wires, or if he saw them, then it was foreseeable due to their very small size and color and the environment in the area to lose sight of these ground wires.

I find that Bonneville Power Administration's negligence was a proximate cause of Mr. Mitchell's aircraft striking the ground wires. But for the failure of Bonneville Power Administration to mark the ground wires, Mr. Mitchell would not have struck them.

Once again, I find that Bonneville Power Administration made no independent inquiry or investigation as to the risk or hazard to aviation created by the unmarked ground wires other than the mere submittal, the form submittal to the FAA, who based upon the fact that the wires did not reach into the 500 plus foot air space, did not advise the installation of markers.

I find that Bonneville Power Administration disregarded its responsibility to pilots traversing this area. This finding of negligence on the part of Bonneville Power Administration does not require it to mark all of its lines. It does, however, impose a responsibility on Bonneville Power Administration at the time of the installation or even subsequent thereto to investigate thoroughly the conditions which exist along its lines to determine whether or not there are conditions such as those herein existing as would mandate the installation of warning devices.

Once again, in this case we do not have the mere existence of a Bonneville Power line running across level land. We have a 2,600 foot clear span between towers crossing a populated agricultural area closely associated with the Ellensburg area, and I do note also from Exhibit No. 4 that there are two landing fileds also located in the Cle Elum area, which is reasonably close to the accident site, although I do not find that the existence of those airports in and of themselves mandated the marking of the transmission lines.

I further find that Mr. Mitchell himself was contributorily negligent. Despite the circumstances which existed, which, as I say, appeared to me to be a trap to a pilot

because of the blending of the ground wires with the transmission wires, with the sky, with the environment of the area, despite that, the existence of the goats peak on the Grand Coulee-Raver towers would alert a reasonably careful pilot to the existence of ground wires.

Obviously, if Mr. Mitchell would have been able to follow the ground wires or if he saw the ground wires he would not have flown his aircraft into them. Exercising the care which a spray pilot should have exercised, Mr. Mitchell should have determined the altitude of these ground wires which he should have remained above in order to have been clear of the ground wires. That could have been accomplished by his flying over the goats peak on each side of this valley and determining altitude from his altimeter. However, I find that the negligence of Mr. Mitchell was not equal to that of Bonneville Power Administration.

I do agree with Mr. Jones and the suggestion that Mr. Jones makes that it may well have been that Mr. Mitchell, who was aware of Mount St. Helens' cloud a substantial distance to the southwest, that that may have caused him not to exercise that degree of care that he ordinarily would have exercised.

I find that Mr. Mitchell's comparative negligence was twenty-five percent of the total; the comparative negligence of Bonneville Power Administration failing to mark the wires would, therefore, be seventy-five percent.

With regard to the loss sustained by the Mitchell estate, I would like to make the following findings, and, counsel, rather than having myself attempt to compute these out, if you would have your economists compute it out, and I'm sure by my giving you this formula they can and these findings which I will make, they can then compute it out. I have other things to do then try to compute the discount rates.

First, with regard to Mr. Mitchell's earnings, I find the more credible base salary testimony to be that of Dr. Barnes. I feel that the testimony of Dr. Barnes as to the salary which Mr. Mitchell would have earned from 1980 through 1984 based upon his 1979 income is the better reasoned analysis, that being the 1979 income of $23,800.

I find that Mr. Mitchell's income of $23,800 would

have increased at eight percent per year from 1979 through 1984, and if you would have your accountants compute, therefore, the past earnings.

The medical benefits are as agreed to by the two experts. I find the home service testimony of Dr. Franz to be more credible, that loss being the $13,500.

With regard to future earnings, I find that Mr. Mitchell would have worked full-time to age 65. I find that he would have worked half-time from age 65 to 70.

I find that the formula used by Dr. Franz is the appropriate formula as to future earnings, subject, however, to the salary base being that which I have set forth, to-wit, the $23,800 in 1979. I think that where we have an earnings record of an individual that it is appropriate to use that rather than what some others may be earning in other areas of the industry.

I find that the income of Mr. Mitchell would have increased at five percent per year commencing with January 1, 1985, and would have continued at that increase until he reached 65 with commensurate increase to age 70 provided he would have only worked half-time.

I find that Dr. Franz' formula as to discount and the income tax treatment is the appropriate formula to be utilized.

With regard to the consumption rate, Dr. Franz used a thirty percent consumption rate, as I recall, and Dr. Barnes used a forty-two percent rate. Dr. Barnes did not have the benefit of talking to the Mitchells as such. Dr. Barnes acknowledged that the consumption by the decedent, of course, depends to some extent upon his life style.

I find that the appropriate consumption rate in this case is thirty-three and one third percent, or one-third. That would appear to me to result in a present economic loss in the area of $250,000 to $300,000, although that will, of course, depend upon the actual calculations.

Now, before I talk about Mrs. Mitchell's claim, I am satisfied that despite Justice Frankfurter, I was correct in my analysis on ruling on the Motion for Summary Judgment. I am unable to find that the so-called policy of Bonneville Power Administration was that type of action as to constitute a discretionary act, which would exempt this

claim from the Federal Tort Claims Act for the reasons I have set forth in my memorandum opinion denying the government's motion to dismiss based upon the discretionary function exemption claim.

I will look at the authority, although it would seem to be clear, that Mrs. Mitchell's claim for loss of society, companionship, consortium is not to be reduced by the negligence of twenty-five percent which I have found by Mr. Mitchell.

The government's counterclaim likewise will be allowed based upon a percentage of comparative negligence that I have set forth, to-wit, the government's claim of some $23,000, whatever the stipulated figure was, for repair of the cut transmission line.

I think we all agree that it is an extremely difficult task to ask any trier of the fact, whether it be a judge or jury, to set the value of the loss of a spouse. No monetary award will return Mr. Mitchell to Mrs. Mitchell's life. I agree that she has done well considering the fact that this was a close marriage. As I listened to her the thought came to me that Mr. and Mrs. Mitchell had the type of marriage and did the things together that good marriages are made of. They worked together, socialized together, attended church together, and raised obviously six fine children together.

We must accept things as they are now. However, I do find that the appropriate award for the loss of society and companionship to Mrs. Mitchell is the sum of $90,000.

Those, of course, are the oral findings of the court. If counsel wish to submit comments on those findings or request me to make additional findings if you feel it's appropriate, please feel free to do that. I would like to have those within ten days. I would like to have this matter resolved and in final form by the 20th of January. I would like to have your comments, as I say, within ten days.

I am going to be serving out of the district quite a bit. I will be out three weeks in February and two or three weeks trying a case out of the district in March, so I would like to have this all resolved, if at all possible, before then. I will be back from the February assignment on February the 25th, and I will be here until March the 9th or so. If

there are motions that you wish to file, we could note them during that two-week period.

I would suggest, counsel, that if plaintiff seeks the award of any interest that isn't computed in on past earnings or any other portion of the award and likewise Bonneville on its claim, that you submit that in your memorandum to me.

Do you have any specific additional findings in mind at this time, Mr. Dano?

MR. DANO: I don't think so, your Honor. I think you covered everything.

THE COURT: Mr. Lamp?

MR. LAMP: I have nothing, your Honor. Would it be possible, your Honor, to type up that portion of your decision on the computations so that we could hand that to our experts?

THE COURT: It may be that you would want the entire opinion, I assume, anyway.

MR. DANO: Yes, sir. I would like to have it, your Honor.

THE COURT: Do you feel I left out any factual findings that needed to be made as far as the economic loss?

MR. LAMP: My only concern, and this is just a question, your Honor, is you adopted Dr. Franz' formula. His formula had specific numerical values in there, and I take it if they are different then the ones you've found—

THE COURT: Yes. I just adopted his formula that he used utilizing then the inflation as far as increased wages and the discount rates that I have found and the wage scale which I have found Mr. Mitchell would have earned.

87-301 (2)

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1986

OPAL V. MITCHELL, AND WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioners,

v.

UNITED STATES OF AMERICA, AND BONNEVILLE POWER ADMINISTRATION,

Respondents.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CURCUIT

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PARTIES

Petitioner State of Washington additionally states that petitioner Opal V. Mitchell is represented in this matter by private counsel, Harrison K. Dano.

JURISDICTION

Petitioner State of Washington additionally notes that on April 29, 1986 petitioner filed its Petition for Rehearing En Banc with the United States Court of Appeals for the Ninth Circuit. Thereafter, the 9th Circuit on its own motion treated this petition as a Petition for Rehearing and Suggestion for Rehearing En Banc. The 9th Circuit denied this petition by an order filed April 24, 1987. This order is reprinted in the appendix to this Supplemental Petition for Certiorari.

FILED

APR 24 1987

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPAL V. MITCHELL, Appelle, v. UNITED STATES OF AMERICA, Appellant.	No. 85-3744 DC No. C 82-880-JLQ ORDER

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Before: WALLACE and SKOPIL, Circuit Judges, and
HENDERSON, District Judge*

The panel has voted to deny the petition for rehearing. Judge Wallace has voted to reject the suggestion for rehearing en banc, and Judges Skopil and Henderson recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

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* The Honorable Thelton E. Henderson, United States District Judge for the Northern District of California, sitting by designation.

Supreme Court, U.S.
FILED
AUG 27 1987
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No. 87-301

In the Supreme Court of the United States

OCTOBER TERM, 1987

OPAL V. MITCHELL AND WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES, PETITIONERS

v.

UNITED STATES OF AMERICA AND BONNEVILLE POWER ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1987

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OPAL V. MITCHELL AND WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES, PETITIONERS

v.

UNITED STATES OF AMERICA AND BONNEVILLE POWER ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the decision of the Bonneville Power Administration ("BPA"), a federal agency, to follow Federal Aviation Administration (FAA) guidelines on the marking of its power lines does not fall within the "discretionary function" exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a).

1. In May 1980, Vernon Mitchell, petitioners' decedent, was killed while crop dusting a field located in a valley near the Yakima River in Washington when his airplane struck an unmarked wire strung across the valley as part of BPA's power transmission system (Pet. App. A1, B2-B4). The BPA had not marked the wire, which was 400 feet above the ground (Pet. 4), because it decided to rely on FAA guidelines regarding the marking of power lines. Those guidelines required marking of power lines only at heights of 500 feet or greater (Pet. App. A3).

Washington state law requires markings for wires or lines as low as 150 feet where, as presumably was the case here, they cross certain routes frequented by small aircraft (Pet. 5).

The district court rejected the government's contention that petitioners' suit under the FTCA was barred by the discretionary-function exception, 28 U.S.C. 2680(a), reasoning that the agency decision was made at the operation level rather than at the planning level (see Pet. App. A3). The court imposed liability after concluding that the BPA was negligent in failing to mark the ground wires and in "blindly relying upon the advice of the Federal Aviation Administration as to whether or not the lines should be marked without making any independent investigation or inquiry itself or seeking comments specifically from pilots or pilot organizations * * *" (*id.* at B5). The court also found that Mr. Mitchell was 25% contributorily negligent (*id.* at B8).

The court of appeals reversed, holding that the BPA's decision to rely on the FAA policy was insulated from tort liability by the discretionary-function exception to the FTCA. "The BPA did not negligently install or maintain warning devices, but rather, affirmatively decided to adopt the FAA's policy of not marking ground wires below 500 feet" (Pet. App. A3). The court rejected petitioners' argument that the BPA was without discretionary authority to breach the mandatory duty of care imposed by Washington law, because "[n]egligence * * * is irrelevant to the discretionary function issue. The FTCA itself exempts discretionary functions 'whether or not the discretion involved be abused.' 28 U.S.C. 2680(a)." *Id.* at A3-A4.

2. The court of appeals was plainly correct. As petitioners note (Pet. 4), "[t]he BPA has established a policy of following the guidelines of the [FAA]." The decision to rely on the federal agency with expertise in airplane safety

and a statutory mandate to regulate air safety, 49 U.S.C. 1421, is, as the court of appeals concluded (Pet. App. A3), obviously a discretionary decision founded on policy judgment. It is therefore protected by the discretionary-function exception to the FTCA. See *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). Of course, the protected decision to adhere to the FAA guidelines makes irrelevant the breach of any other applicable duty to warn.

The decision of the court of appeals presents no conflict warranting this Court's review. First, contrary to petitioners' contention (Pet. 7-8), *Aslakson* v. *United States*, 790 F.2d 688 (8th Cir. 1986), does not conflict with the decision below, because the federal agency in that case was held liable for negligently implementing its policy of raising its power lines in certain circumstances (*id.* at 693). Here, the alleged negligence was not in BPA's implementing a policy, but in making the policy decision to follow FAA guidelines. Second, any apparent conflict among the circuits on whether the distinction between operational and planning decisions is relevant to applying the discretionary-function exception (Pet. 9-11) is simply immaterial in this case. The BPA's decision to follow FAA guidelines obviously was one of planning, which would fall within the exception in every circuit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1987

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Respondents.

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondents (hereinafter the Bonneville Power Administration or BPA) and the Ninth Circuit have both sidestepped the principal issue in this case by making a fundamentally wrong assumption concerning the effect of the discretionary function exception of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a)-i.e., that it somehow vests in federal agencies immunized authority to define for themselves the scope of their duties in tort. According to the Ninth Circuit and the BPA, federal agencies may render inoperative otherwise mandatory tort duties, by affirmatively deciding to ignore them, in favor of observing less stringent, merely minimum regulatory standards.

The BPA advances this erroneous view on page 3 of its Memorandum in Opposition where, without citation of authority, it states:

> Of course, the protected decision to adhere to the FAA guidelines makes irrelevant the breach of any other applicable duty to warn.

This is a remarkable concept—one totally foreign to the FTCA and tort law principles. It not only assumes a protected status for a decision to forego a mandatory duty, it also effectively elevates minimum regulatory standards to the maximum tort standards against which the conduct of agencies of the United States may be measured. It thus allows federal agencies to negate the principle set forth in Restatement of Torts (2d) § 288(c):

> Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.

The decision below rests upon the same erroneous assumption. The Ninth Circuit assumes that a decision by a federal agency to ignore an otherwise mandatory tort duty is protected by the discretionary function exception of the FTCA. (Pet. App. A3-A4). The only rationale offered by the Ninth Circuit for this view is an inapposite one. The Court below simply states, "Negligence * * * is irrelevant to the discretionary function issue." (Pet. App. A3). We readily acknowledge that the exercise of a discretionary function is immunized from liability under 28 U.S.C. § 2680(a), whether or not the discretion involved is abused. But reciting this principle begs, not answers, the question of whether a decision to ignore a mandatory tort duty is a protected discretionary decision in the first instance.

Presumably, neither the Ninth Circuit nor the BPA would openly assert that the FTCA imposes liability on a federal agency when it breaches a mandatory tort duty, but frees that same agency from liability so long as it first affirmatively decides to ignore the duty. Yet, that is the very essence of the decision below and the basis upon which the BPA attempts to cloud the conflict between this case and the Eighth Circuit's decision in *Aslakson v.*

United States, 790 F.2d 688 (8th Cir. 1986). The BPA suggests that the feature distinguishing the instant case from *Aslakson* is that unlike the federal agency in *Aslakson*, the BPA is immune from liability for otherwise actionable negligence because it preceded that actionable activity with an affirmative decision to engage in it. This premise is not only rejected by *Aslakson*, it also is explicitly rejected by the Tenth Circuit in *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976), a second decision in clear conflict with the Ninth Circuit holding below. In *Smith*, the Tenth Circuit recognized that acceptance of the same argument advanced here by the BPA would effectively insulate the federal government from liability in tort. As the Tenth Circuit stated:

> If we were to accept the Government's broad interpretation of the discretionary exception, it is difficult to perceive which duties under tort law could not be avoided by a similar policy decision to ignore them.

Smith, supra 546 F.2d 877.

This is not, as the BPA endeavors to paint it, a narrow fact-specific case. The primary issue raised here extends far beyond the instant case and strikes at the heart and scope of the discretionary function exception of the Federal Tort Claims Act.

The Ninth Circuit, in a decision that puts it at direct odds with several other Circuits, has effectively appointed federal agencies as the final arbiters of their own tort liability. This conflict and fundamental error should be reviewed by granting our petition for certiorari.

Respectfully submitted,

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